APPELLANT PRO SE:

CONNIE REED
Otwell, Indiana

IN THE
COURT OF APPEALS OF INDIANA

CONNIE (QUERY) REED,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 63A05-0703-CV-193
	)	
ROBERT QUERY,	)	
	)	
Appellee.	)	

APPEAL FROM THE PIKE CIRCUIT COURT
The Honorable Michael D. Chestnut, Referee
Cause No. 63CO1-9209-DR-158

October 25, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Connie (Query) Reed (Mother), pro se, appeals the trial court's order granting Robert Query's (Father) verified petition to modify his obligation to pay post-secondary educational expenses for N.Q., their youngest son. Mother presents three issues for our review:

1. Did the trial court err in granting Father's petition to modify his obligation to pay post-secondary educational expenses?

2. Did the trial court err in failing to order Father to pay his share of N.Q.'s post-secondary educational expenses incurred prior to Father's October 18, 2006 petition?

3. Did the trial court err when it asked Mother to waive a potential conflict of interest occasioned by the fact that the trial judge's law partner was representing Father in an unrelated matter?

We affirm in part, reverse in part, and remand.

Mother and Father have two children, the youngest of whom, N.Q., was born September 7, 1984. Mother and Father were divorced in June of 1986. N.Q. graduated from high school in 2003. Thereafter, N.Q. attended Vincennes University for three years, majoring in pre-pharmacy. For his fourth year of post-secondary education, N.Q. transferred to Oakland City University and changed his major to business.

In a court order dated December 20, 2004, Father was ordered to pay forty percent of N.Q.'s post-secondary educational expenses for four years and Mother was ordered to pay the remaining sixty percent. As part of that same order, the trial court found that at the conclusion of N.Q.'s first year at Vincennes University, there were no outstanding amounts due and owing to Vincennes University. At the end of his second year, the

amount outstanding was $1,136.80, and the trial court ordered Mother and Father to pay their respective shares.

On January 30, 2006, Mother filed a Verified Motion for Contempt with regard to N.Q.'s post-secondary educational expenses for the 2005-2006 school year, N.Q.'s third year at Vincennes University. Father's portion of those expenses totaled $922.78. On June 19, 2006, Mother appeared in court without counsel on her motion for contempt, but Father failed to appear after being given notice of such hearing. The trial court entered judgment against Father in the sum of $922.78 for his failure to pay the amount required by the court's December 2004 order. The trial court also issued an order for Father to appear for a hearing on September 6, 2006.

At the September 6 hearing, Mother appeared without counsel, and Father again failed to appear. The court issued a Writ of Attachment for Father's appearance, but further provided in its order that in lieu of his appearance, Father could post the sum of $922.78. On September 14, 2006, Father was served with the writ and subsequently posted a personal appearance bond in the amount of $922.78.

In the meantime, N.Q. enrolled for his fourth year of post-secondary education in August 2006 at Oakland City University. On September 19, 2006, Mother sent a letter to Father outlining the educational expenses for N.Q. to attend Oakland City University for the Fall semester, including tuition, fees, and books. The total expenses were $7,563.90, and Father's forty percent share was $3,025.56.

Prior to sending the letter to Father,[1] Mother, having no expectation that Father would fulfill his support obligation with respect to the educational expenses, filed a petition seeking assistance from the trial court in enforcing the December 2004 order as it related to N.Q.'s educational expenses for his enrollment in Oakland City University. The trial court set the matter for hearing on October 18, 2006. Prior to the October 18 hearing, Father filed the instant petition to modify requesting that the court modify its December 2004 order and find that Father should no longer be responsible for N.Q.'s college expenses due to Father's disability.

At the start of the October 18 hearing, the trial court disclosed on the record that it had a potential conflict of interest in that his law partner also represented Father in a social security disability matter. After being so advised, Mother expressly waived the potential conflict of interest. Mother then moved the court to continue the hearing. The trial court granted Mother's motion and rescheduled a hearing for December 13, 2006 on Mother's motion to enforce and Father's petition to modify. The trial court also ordered the Clerk of the Pike Circuit Court to distribute the $922.78 to Mother.

At the December 13 hearing, the parties presented evidence as it related to their respective petitions. On January 22, 2007, the trial court entered an order granting Father's petition to modify, essentially terminating Father's obligation to pay N.Q.'s post-secondary educational expenses associated with his enrollment in Oakland City University. In support of its decision to modify Father's obligation, the trial court found

[1] Mother claimed that Father was aware of the expenses associated with N.Q.'s enrollment for the Fall 2006 semester prior to her writing of the letter. Mother claimed that she wrote the letter to serve as documentation of those expenses.

that Father was no longer employable due to his disability and that N.Q., being twenty-two years of age and employed on a full-time basis, was capable of providing for his own college expenses. Mother filed a motion to correct error on February 16, 2007, which the trial court denied five days later without a hearing.

Before addressing Mother's arguments, we note that Father has filed no appellee's brief. In such case, we do not undertake the burden of developing arguments for the appellee, but instead, applying a less stringent standard of review, may reverse the trial court if the appellant establishes prima facie error. *Everette v. Everette*, 841 N.E.2d 210 (Ind. Ct. App. 2006). In this sense, prima facie means at first sight, on first appearance, or on the face of it. *Id*.

1.

Mother argues that the trial court erred in granting Father's petition to modify his post-secondary education support obligation. Specifically, Mother argues that the trial court's finding of a change in circumstances due to Father's disability is against the evidence provided by Father given Father's own testimony regarding his ability to perform as a restaurant/bar owner and operator.

We begin by noting that orders requiring the payment of college expenses are modifiable because college expenses are in the nature of child support. *Borum v. Owens*, 852 N.E.2d 966 (Ind. Ct. App. 2006). A modification may be made only upon a showing of changed circumstances so substantial and continuing as to make the current terms unreasonable. Ind. Code Ann. § 31-16-8-1(1) (West, PREMISE through 2007 Public Laws approved and effective through April 8, 2007). "'[A]ppellate courts give

considerable deference to the findings of the trial court in family law matters, including findings of "changed circumstances" within the meaning of Indiana Code section 31-16-8-1.'" *Borum v. Owens*, 852 N.E.2d at 969 (quoting *MacLafferty v. MacLafferty*, 829 N.E.2d 938, 940 (Ind. 2005)). Whether the standard of review is phrased as abuse of discretion or clear error, the importance of first-person observation and avoiding disruption remain compelling reasons for deference. *Borum v. Owens*, 852 N.E.2d 966.

The record reveals that Father quit his job in August 2005 due to a medical condition that affects his eyesight. With regard to his medical condition, Father explained that he loses sight for short periods of time, a condition that cannot be reversed. Father testified that he is blind in his right eye and that he is going blind in his left. As a result of his medical condition, Father has not been gainfully employed since August 2005 and has since applied for social security disability benefits, which, at the time of the December 13 hearing, had yet to be awarded.

As pointed out by Mother, Father admitted that since quitting his job, he has worked in a restaurant/bar owned and operated by him and his current wife. Father testified that he tends bar, cleans up, washes dishes, and anything else that needs to be done. Father maintained that the income for the restaurant/bar for the year 2005 was a net loss in excess of $8,000, and that he has no other source of income because "I'm not allowed to make anything." *Transcript* at 43. Father also testified that he drives his car during the day and at night, although he is restricted to driving during daylight hours.

In granting Father's petition to modify, the trial court found that Father is no longer employable because of his disability and further noted that N.Q., being twenty-two

years of age and employed full-time, was capable of providing for his own college expenses. Having reviewed the record, we conclude that the evidence supports the trial court's findings. Indeed, the record demonstrates that Father suffers from a medical condition that renders him unable to work in the same manner he has worked for all of his adult life. Father's condition will not improve, but progressively worsen to the point where he is blind in both eyes. Father is currently unemployed and is seeking social security disability benefits. Although Father is currently capable of performing certain tasks associated with operating a restaurant/bar, i.e., washing dishes, taking orders, making change, Father clearly does not have the same earning power he once had on account of his disability. Given these circumstances, coupled with the fact that N.Q. is employed full-time earning a decent wage, we cannot say that the trial court erred in concluding there had been a significant change in circumstances so significant and continuing as to render the order for Father to pay forty percent of N.Q.'s college expenses unreasonable.

2.

Mother argues that the trial court erred by failing to order Father to pay his forty-percent share of N.Q.'s post-secondary education expenses incurred prior to Father's October 18, 2006 petition to modify.[2]

As noted above, an order for the payment of college expenses is in the nature of an order for child support. *See Borum v. Owens*, 852 N.E.2d 966. "'Retroactive

[2] In order to be able to register for the Spring 2007 semester, N.Q. took out a student loan to cover a portion of Father's forty percent share for the Fall 2006 semester.

modification of support is erroneous only if the modification purports to relate back to a date earlier than that of the petition to modify.'" *Carter v. Dayhuff*, 829 N.E.2d 560, 567 (Ind. Ct. App. 2005) (*quoting Reeves v. Reeves*, 584 N.E.2d 589, 594 (Ind. Ct. App. 1992), *trans. denied*). In other words, a trial court has the discretionary power to make a modification for child support relate back to the date the petition to modify is filed, or any date thereafter. *Id*.; *see also Naggatz v. Beckwith*, 809 N.E.2d 899 (Ind. Ct. App. 2004), *trans. denied; Haley v. Haley*, 771 N.E.2d 743 (Ind. Ct. App. 2002). "[O]nce funds have accrued to a child's benefit under a court order, the court may not annul them in a subsequent proceeding." *Nill v. Martin*, 686 N.E.2d 116, 118 (Ind. 1997).

Here, Father filed his petition to modify on October 18, 2006; thus, the trial court could modify Father's obligation only with respect to payment of N.Q.'s college expenses as of that date. Prior to Father's filing of his petition, however, Mother had filed a motion requesting the court's assistance in enforcing the December 2004 order with regard to Father's obligation for the Fall 2006 semester because by that time, N.Q. had already enrolled in Oakland City University and incurred expenses for tuition, fees, and books. As N.Q. had incurred such expenses prior to Father's petition to modify, the trial court erred in failing to order Father to pay his portion of N.Q.'s college expenses for the Fall 2006 semester.[3] The trial court's termination of Father's obligation to pay N.Q.'s

[3] N.Q. was eventually awarded a half-tuition scholarship, thereby reducing Father's forty percent share of the expenses for the Fall 2006 semester to $1,639.56.

college expenses is, however, applicable with regard to the payment of N.Q.'s college expenses for the Spring 2007 semester.[4]

3.

Mother argues that the trial court erred when the judge asked Mother to waive the judge's possible conflict of interest arising out of the fact that the judge's law partner was representing Father with regard to Father's pending social security disability claim. Mother's sole argument in this regard is that the judge, through his law partner, would realize financial gain upon success of Father's disability petition. Mother thus maintains that such conflict was highly prejudicial to her case and therefore, could not be waived by her.

At the start of the October 18 hearing and again at the December 13 hearing, the trial court judge advised Mother of a potential conflict of interest arising from the fact that the judge's law partner was representing Father with regard to his claim for social security disability benefits. At the October 18 hearing, the following discussion occurred between the trial court and Mother:

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[4] In her brief, Mother states that the December 2004 order requiring Father to pay his proportionate share of the college expenses was in full force when N.Q. enrolled in Oakland City University for the Spring 2007 semester as the trial court did not modify Father's obligation until its January 22, 2007 order. Mother asserts that Father's proportionate share of expenses for the Spring 2007 semester totaled $1,574.42. Mother further points out that N.Q. obtained a second student loan to cover a portion of Father's share for the Spring 2007 semester.

We note that at the time N.Q. enrolled for the Spring 2007 semester, Mother and N.Q. were fully aware of Father's disability and his financial situation which served as the basis for his request that the trial court terminate his obligation to pay his portion of N.Q.'s college expenses. Mother and N.Q. were thus well aware, prior to N.Q.'s enrollment for the Spring semester, that Father's obligation to pay his share of such expenses could be terminated by the court.

THE COURT:	[Mother], based on that disclosure, and, . . . the facts that . . . [Father] has gotten my partner as an attorney, what are your feelings as to the conflict?
[MOTHER]:	Does that [a]ffect this case or just his disability?
THE COURT:	Well, I don't hear his disability. But, the conflict would be that my partner represents him and anytime that I have a partner that represents anybody even though it's a different, whole different case, I don't want someone to think . . . I may rule in favor of him, I may rule in favor of you, I have no idea at this time but I don't want to get down to issuing an Order that is in favor of him and you say well, he's just doing that because Tim Dant is representing him and it's his partner. So, if you feel that way, that's perfectly fine, I just need to know . . . .
[MOTHER]:	I don't have a problem with it.
THE COURT:	Okay.
[MOTHER]:	I don't see that there's a conflict.
THE COURT:	Okay. Uh, I mean, if, . . . so it's my understanding then, that you want to proceed with me as the Judge on this matter?
[MOTHER]:	Yes.

Transcript at 5-6. At the December 18 hearing, the trial court confirmed with the parties that they had no objections to his hearing the matter in light of the fact that his law partner represented Father with regard to his social security disability claim.

As evidenced by the foregoing, Mother failed to object or move for recusal after the trial court informed her of his involvement with the attorney Father had hired to handle his disability claim. As has been noted by this court, "'Timeliness is important on recusal issues.'" *Carr v. State*, 799 N.E.2d 1096, 1098 (Ind. Ct. App. 2003) (*quoting Tyson v. State*, 622 N.E.2d 457, 460 (Ind. 1993)). "A party may not lie in wait and only raise the recusal issue after receiving an adverse decision." *Id*. We thus conclude that

Mother has waived the issue for review. We further note that Mother cites no authority to support her claim that she could not waive the potential conflict of interest.

In summary, we affirm the trial court's modification of Father's obligation to provide for N.Q.'s post-secondary education except to the extent such modification was made retroactive so as to terminate Father's obligation with respect to such expenses incurred by N.Q. prior to Father's filing of his petition for modification. We therefore remand with instructions for the trial court to correct the support modification order consistent with this opinion

Judgment affirmed in part, reversed in part, and remanded with instructions.

SHARPNACK, J., and RILEY, J., concur.